BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

TYRELL JOSEPH KAILIHIWA	)	
Claimant	)	
	)	
VS.	)	
	)	
STATE OF KANSAS	)	
Respondent	)	Docket No. **1,062,197**
	)	
AND	)	
	)	
STATE SELF-INSURANCE FUND	)	
Insurance Fund	)	

ORDER

Respondent and its insurance fund (respondent) request review of the May 6, 2013, Award by Administrative Law Judge (ALJ) Rebecca Sanders. The Board heard oral argument on September 4, 2013.

APPEARANCES

Matthew Bergmann of Topeka, Kansas, appeared for claimant. Nathan Burghart of Lawrence, Kansas, appeared for respondent.

RECORD AND STIPULATIONS

The Board has considered the entire record and adopts the stipulations listed in the Award.

ISSUES

The ALJ awarded claimant permanent partial disability (PPD) benefits based on an 8% functional impairment to the body as a whole. The ALJ also awarded future medical treatment with Dr. Guy Giroux. There is no issue regarding work disability.

Respondent requests that the Board modify the Award and find claimant sustained a 6% impairment of function and that claimant be denied future medical treatment with Dr. Giroux.

Claimant argues that he is entitled PPD based on a 10% whole body functional impairment.

The issues on review are:

1. What is the extent of claimant's permanent functional impairment?

2. Did the ALJ err in awarding claimant future medical treatment with Dr. Giroux?

FINDINGS OF FACT

Having reviewed the evidentiary record, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings:

On June 29, 2012, claimant was employed as a developmental disability technician for the Kansas Neurological Institute (KNI). His job required him to care for eight men (clients) with disabilities. Claimant had to bathe, clean, feed, move and reposition the clients. He assisted the clients in other activities of daily living such as taking the clients shopping.

At 4 p.m. daily, claimant was required to check on the personal well being of his clients. He was engaged in that task on June 29, 2012. Claimant testified:

> A. The client had slid down in his recliner so far down that his head was pushed forward by the back of the recliner and was blocking his trachea. And he has got a trach tube and it was impairing his airway.[1]

Claimant attempted to reposition the client so his airway would remain open. Claimant testified:

> A. I bent down to get my arms underneath his back, behind his knees, to pull him, and had an arm behind his back, and was kind of slide and tilt at the same time.[2]

As claimant repositioned the client, he felt a pop and a burning sensation in his lower back. Respondent referred claimant to Dr. Donald Mead at the Occupational Clinic at St. Francis Hospital. Dr. Mead prescribed medication, physical therapy and restricted duty.

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[1] R.H. Trans. at 9.

[2] *Id*. at 10.

A lumbar MRI scan conducted on July 27, 2012, revealed a small left foraminal disk protrusion at L5-S1 without definite nerve root impingement.

Claimant testified he had no problems with his back before the June 29, 2012 accident. He returned to regular duty work for respondent on December 3, 2012.

Dr. Edward Prostic, a board certified orthopedic surgeon, evaluated claimant at his attorney's request on October 16, 2012. The doctor reviewed claimant's medical records, took a history and performed a physical examination. Dr. Prostic opined that claimant's June 29, 2012 accident was the prevailing factor in causing the injury, the need for medical treatment and the resulting disability.

Based upon the AMA *Guides*,[3] Dr. Prostic found claimant sustained an 8% permanent functional impairment to the whole body for the low back injury.

Dr. Prostic testified as follows:

> Q. Okay. At that time [of Dr. Prostic's examination], you indicated that he didn't have true radiculopathy. Can you explain your finding there?
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> A. He reported symptoms that went to the posterior left knee, but not below that. And he did not have physical findings to support radiculopathy. So that is why I thought that though he had a disc problem that would support a radiculopathy, I -- I couldn't make the diagnosis of an unquestioned radiculopathy at the time I saw him.[4]

Before Dr. Prostic testified, he was provided with additional medical records, including reports by Drs. Gilbert and Zarr. Dr. Prostic opined:

> A. He [claimant] appears to have had a worsening from the time I examined him until the time he was examined by Doctor Gilbert. He had some atrophy in his calf, reflex deficit and weakness when examined by Doctor Gilbert. Those were not present when I saw him.
>
> . . .
>
> Q. Okay. With the new information you received regarding his additional complaints or his changing complaints, would your impairment rating change?

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[3] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the AMA *Guides* unless otherwise noted.

[4] Prostic Depo. at 11.

> A. Well, assuming the physical examination by Doctor Gilbert to be accurate, then he should have a 10 percent impairment rating.[5]

Dr. Prostic testified that if claimant had physical evidence of radiculopathy then he would fall into DRE Lumbosacral Category II for a 10% impairment. The doctor testified that future medical treatment in the form of epidural steroid injections "would be very good" if claimant continued to experience radiculopathy.[6]

Dr. James Zarr, board certified in physical medicine and rehabilitation and electrodiagnostic medicine, evaluated claimant on February 19, 2013, at the request of respondent's attorney. The doctor reviewed claimant's medical records, took a history and performed a physical examination. Dr. Zarr diagnosed claimant with persistent low back pain and recommended a series of lumbar epidural steroid injections followed by a work hardening program.

Based upon the AMA *Guides*, Dr. Zarr rated claimant's impairment at 6% to whole body, thus placing claimant between DRE Category II (5%) and Category III (10%).

Dr. Zarr admitted that he was not provided with claimant's medical records from St. Francis Hospital Occupational Clinic, the report of the July 27, 2012 MRI scan nor the pain management records.

Dr. Zarr found "the significant absence of findings that would indicate a radiculopathy,"[7] although he admitted claimant had a positive straight leg raising test and that claimant complained of pain radiating into the left leg.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2011 Supp. 44-501b provides in part:

> (c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 44-508(h) provides:

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[5] Prostic Depo. at 11-12.

[6] *Id.* at 13.

[7] Zarr Depo. at 32-33.

> "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

K.S.A. 2011 Supp. 44-510h(e) provides:

> It is presumed that the employer's obligation to provide the services of a health care provider, and such medical, surgical and hospital treatment, including nursing, medicines, medical and surgical supplies, ambulance, crutches, apparatus and transportation to and from the home of the injured employee to a place outside the community in which such employee resides, and within such community if the director, in the director's discretion, so orders, including transportation expenses computed in accordance with subsection (a) of K.S.A. 44-515, and amendments thereto, shall terminate upon the employee reaching maximum medical improvement. Such presumption may be overcome with medical evidence that it is more probably true than not that additional medical treatment will be necessary after such time as the employee reaches maximum medical improvement. The term "medical treatment" as used in this subsection (e) means only that treatment provided or prescribed by a licensed health care provider and shall not include home exercise programs or over-the-counter medications.

K.S.A. 2011 Supp. 44-510e(a) provides in relevant part:

> (2) (A) Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d, and amendments thereto.
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> . . .
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> (B) The extent of permanent partial general disability shall be the percentage of functional impairment the employee sustained on account of the injury as established by competent medical evidence and based on the fourth edition of the American medical association guides to the evaluation of permanent impairment, if the impairment is contained therein.

CONCLUSIONS OF LAW

The issue of the nature and extent of claimant's impairment of function merits no extended discussion. There are two impairment ratings in this record: Dr. Zarr's 6% to the body and Dr. Prostic's 8% to the body. Both physicians based their ratings on the AMA *Guides* and the methods they employed in arriving at their opinions were similar. Both doctors, when considering their own findings on physical examination, concluded claimant did not fit comfortably within either DRE Lumbosacral Category II or III under the AMA

Guides. Both physicians exercised their judgments and rated claimant's impairment between Categories II and III. The ALJ found claimant's functional impairment was between the two rating opinions and found claimant's impairment was 8% to the whole body.

The Board can find no sound basis on which to alter the ALJ's judgement regarding claimant's impairment and adopts that finding as fully supported by a preponderance of the credible evidence.

The Board likewise finds the ALJ properly awarded future medical treatment with Dr. Giroux. Under the version of K.S.A. 44-510h in effect when claimant was injured, a presumption arose, when claimant reached maximum medical improvement, that respondent's obligation to provide further medical treatment was terminated. However, that presumption was rebutted by the medical evidence. Dr. Zarr recommended claimant receive lumbar epidural steroid injections and work hardening. Apparently, respondent's own treating physician, Dr. Mead, also recommended epidurals,[8] as did Dr. Prostic if claimant's radiculopathy continued.[9] Despite the recommendations of two authorized physicians, the record reveals that no epidurals and no work hardening were provided.

The Board finds no reason to disturb the judge's authorization of treatment with Dr. Giroux. The ALJ's Award is affirmed in all respects.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.[10] Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

AWARD

WHEREFORE, the Award of ALJ Rebecca Sanders dated May 6, 2013, is hereby affirmed in all respects.

IT IS SO ORDERED.

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[8] Zarr Depo., Ex. 2 at 1.

[9] Prostic Depo. at 13.

[10] K.S.A. 2011 Supp. 44-555c(k).

Dated this _____ day of September, 2013.

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BOARD MEMBER

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BOARD MEMBER

_____
BOARD MEMBER

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Honorable Rebecca Sanders, ALJ